

## United States Military Justice Overview

### I. Introduction

#### A. Nature and Purpose of Military Law

Military law consists of statutes, departmental regulations, the constitutional powers of the President and regulations issued under Presidential power, and the inherent authority of military commanders. Military law includes criminal jurisdiction exercised by the courts-martial and the administrative jurisdiction exercised by commanders with respect to nonjudicial punishment.

The purpose of military criminal law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military, and to ensure military members accused of criminal misconduct are fairly treated.

#### B. Role of Congress and The President

##### 1. Congress

The foundation of military law is the Constitution of the United States. The Constitution provides that Congress has the responsibility to make rules to regulate the military; it also establishes the President as Commander in Chief of the armed forces.

##### 2. The President

The President's role in military justice is to:

- a. promote and maintain good order and discipline;
- b. make rules for courts-martial;
- c. set maximum punishments - if a sentence of a court-martial provides for the death of the convicted, the sentence may not be executed until approved by the President, who may commute, remit, or suspend the sentence at his discretion.
- d. appoint judges to the highest courts.

#### C. Uniform Code of Military Justice

The Constitution of the United States and the Congress became the source of Military Codes after the Constitution was ratified in 1789. In 1950, Congress enacted the Uniform Code of Military Justice (UCMJ) that serves as the criminal code for all U.S. military personnel. It is amended periodically to reflect changes in the federal and military justice systems.

The goal is a system of military justice that is effective in both wartime and peacetime and balances military performance and due process rights within the framework of the Constitution.

## **II. Jurisdiction in The Military Justice System**

Military status is the key to jurisdiction. The UCMJ lists persons subject to the jurisdiction of courts-martial as:

- A. Active duty personnel;
- B. Cadets, aviation cadets, and midshipmen;
- C. Certain retired personnel;
- D. Members of reserve components under certain circumstances;
- E. Persons in the custody of the armed forces serving sentence imposed by court-martial; and
- F. Prisoners of war.

There are rare instances when a person not subject to the Code is subject to trial by court-martial, (i.e. spies), although jurisdiction is most commonly exercised over active duty personnel.

The UCMJ is a system of criminal justice that is deployable and applies everywhere. Jurisdiction is based on the status of the person as a servicemember and not on the type or location of the crime. The United States military deploys worldwide with large numbers of personnel and unique disciplinary requirements. As such, the military services need military justice system capable of operating in times of peace or conflict, under the same standards home or abroad. The UCMJ is a complete set of criminal laws, which covers many crimes punished under civilian law and military offenses that affect good order and discipline.

## **III. Rights of Service Members**

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A. Sources

1. The sources of rights for service members include the Constitution, Uniform Code of Military Justice, and Manual for Courts-Martial, statutes, regulations and executive orders.
2. Rights of service members may be abridged to a degree due to the unique nature of military service:

*“The Supreme Court of the United States has long recognized that the military is, by necessity, a specialized society separate from civilian society...the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.”*

B. Rights of service members may be divided into three categories:

1. Equal Protection of the laws;
2. Due Process of law; and
3. Freedom of Expression.

**IV. Equal Protection of the Laws**

A. Equal protection under the law regardless of race, religion, culture, national origin, gender or political affiliation is a recognized fundamental human right for all people, including military personnel.

1. “Equal opportunity shall be afforded to all on the basis of individual effort, performance, conduct, diligence, potential, capabilities and talents without discrimination as to race, color, religion, creed, sex or national origin. Naval personnel shall demonstrate a strong personal commitment to stand on these principles and carry them out.”

U.S. Navy Regulations

2. “The United States Army will provide equal opportunity and treatment for soldiers, civilian employees, and their families without regard to race, color, religion, gender, or national origin, and provide an environment free of sexual harassment.”

U.S. Army Regulations

B. Equal Protection contributes to:

1. High morale;
2. Confidence in fairness of military decisions;
3. Selection of the most capable personnel for promotion, additional training and leadership; and
4. Public respect and support for the military.

C. Methods of obtaining Equal Protection

1. Military regulations prohibiting discrimination;
2. Education programs informing personnel of equal protection rights and the obligation not to discriminate;
3. Evaluations of a service members' adherence to equal protection as part of member's fitness reports;
4. Establishment of method for individual victims of discrimination to file a complaint that will be actively investigated;
5. Utilization of fair promotions process based on merit; and
6. Inspection of military units for compliance with equal opportunity goals.

**V. Due Process for Service Members**

A. Due process describes the steps governments must take before they may take action against a citizen. Examples of due process protections for servicemembers are:

1. Advance notification of adverse government action and opportunity to reply;
2. Opportunity to inspect government documents and files and interview government witnesses;
3. Opportunity to have input into government decisions affecting them; and
4. Assistance from a legal professional.

B. In the United States military there are three basic levels of due process protection: administrative, nonjudicial and courts-martial.

1. Administrative Due Process

The vast majority of government decisions affecting service members are administrative in nature. Within this category, there are varying degrees of due process provided to the service members.

a. Promotions / Evaluations

Junior enlisted promotions are based on competitive examinations. Special promotion boards that consider past performance evaluations decide senior enlisted and officer promotions. Due process protections associated with promotions and evaluations include:

- 1) The right of senior enlisted and officers to make written statements presenting facts in rebuttal to adverse evaluations;
- 2) The right of senior enlisted and officers to provide a written statement to the board concerning their promotion;
- 3) Service members' records considered by promotions boards include training requirements, awards, experience and official evaluations;
- 4) The board's proceedings are conducted in private and comments made during the decision-making process may not be reported outside the proceeding; and
- 5) The board's recommendations to promote senior officers must be approved by Congress.

2. Separations

Most separations from the military are voluntary and require a very low level of due process. Involuntary separations require a higher degree of due process depending on the reason and characterization of separation and seniority of the member. The following due process rights are provided to an enlisted member with greater than 6 years of service when he is being separated for misconduct. An enlisted member with less than six years of service might also be provided the following rights depending upon the reason for discharge.

- a. Notification, which includes a detailed description of the reason for the proposed separation and the member's rights prior to separation;
- b. Assistance from a military attorney or the right to hire a civilian attorney;
- c. The right to inspect government files and documents pertaining to the proposed discharge;
- d. A hearing before three officers at which the member can present evidence and call witnesses;
- e. Sufficient time to prepare for the hearing; and
- f. The right to appeal the decision to a civilian discharge review board after separation.

### 3. Nonjudicial Due Process

- a. The UCMJ gives authority to commanders to administer punishment for minor offenses.
- b. The punishments are limited depending on the seniority of the acting officer. In no case will the punishment exceed sixty days restriction or forfeiture of one half pay for two months.
- c. This form of discipline is referred to as nonjudicial punishment (NJP) because it does not require a formal court hearing with normal judicial due process protection.
- d. NJP does, however, generally provide for limited due process guaranteeing only the rights of notice, appearance and response.
- e. NJP applies to both officers and enlisted members.
- f. An accused has the right to request a court-martial rather than consent to NJP.

### 4. Courts-Martial Due Process

- a. Military Courts-Martial can adjudge punishments up to and including execution or life in prison. The highest levels of due process are provided for in these cases. Due

process rights afforded service members subject to courts-martial include:

- 1) charges referred to a court-martial panel by a commanding officer with authority to convene courts-martial;
- 2) the accused must be formally notified of the charges;
- 3) the accused must be permitted to see all of the government's evidence prior to the trial and must be given an opportunity to interview the government witnesses;
- 4) the government must bring the case to trial within 120 days from date of formal charges or 90 days from the date the accused is placed in pretrial confinement; and
- 5) the accused is entitled to free legal representation by an assigned military lawyer, and the accused may hire a civilian lawyer at his or her own expense.

## **VI. Freedom of Expression**

The right of free expression includes the right to express opinions orally, in writing, and at group meetings. Freedom of expression may differ, however, for military personnel.

### **A. Balancing Test**

1. Support for right to freedom of expression:
  - a. free debate and the exchange of ideas bring about many good ideas that may be helpful for society;
  - b. free expression enables the leaders of government to become aware of the desires of the people, so that they may be responsive to the will of the people; and
  - c. citizens are more likely to obey the decisions of the government leaders if they believe the government is listening to them.
2. The proper balancing of a service member's right to express himself and the need for operational readiness may depend largely upon the calm and prudent judgment of the responsible commander.

3. In applying a balancing test, punishment after unlawful speech has taken place is preferred over prior restraint of expression.

B. Freedom of Speech

Service members, like other citizens, have a right to express themselves. However, the right to engage in free speech does not provide an absolute immunity from subsequent punishment if the speech violates a criminal law. In the military, such criminal laws include:

1. disrespectful speech toward superiors;
2. use of words or gestures that might provoke a fight;
3. disclosure of classified information; and
4. discussing official matters outside of the military without proper authorization.

C. Freedom of the Press

Private possession of written material, other than classified matter, by service members does not generally have a negative effect on military discipline or effectiveness. The public display or distribution of written material should be prohibited, however, if the service member's interest in expression is outweighed by command interest in maintaining morale, good order, and discipline. Examples of prohibited material include hate literature and forms of pornography.

D. Right to Peaceful Assembly

1. Demonstrations
  - a. a commanding officer may prohibit on-base demonstrations if a legitimate finding is made that such demonstrations may present a clear and present danger to good order, discipline, and morale;
  - b. the commanding officer may prohibit service members from attending off-base demonstrations under circumstances that would provide for a material interference with the military mission; and
  - c. service members should not be in uniform while attending demonstrations or public group meetings because it will appear to civilians that the military is giving its official support to a particular group.



E. Service Members' Unions

1. Military forces must always be ready to perform their mission. The mission may be dangerous at times therefore U.S. service members cannot join a military labor organization where their allegiance might be divided.
2. Service members are not permitted to strike for higher wages. They can ask their leaders to negotiate for higher wages with the elected officials.

F. Grievances

1. Service members are permitted to present complaints or grievances to their superiors through formal procedures that require responses from superiors.
2. Service members are also given the right to communicate directly with elected civilian officials.

G. Political Activities

1. Service members may vote for the political candidate of their choice; however
2. Service members are prohibited from becoming a candidate for an elected office or participating directly in an election campaign for a particular candidate.

**VII. Nonjudicial Punishment and Administrative Measures**

Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction.

A. Commander's Responsibility

1. Commanders are responsible for good order and discipline in their commands;
2. Discipline can be maintained through effective leadership;

3. Nonjudicial punishment should be considered on an individual basis. Commanders considering nonjudicial punishment should consider:
  - a. the nature of the offense;
  - b. the record of the service member;
  - c. the needs for good order and discipline; and
  - d. the effect of the NJP on the service member and his / her record.

B. Commander's Discretion

1. A commander who is considering a case for NJP will exercise personal discretion in evaluating each case.
2. No superior may direct that a subordinate:
  - a. impose NJP in a particular case; or
  - b. issue regulations or "guides" indicating that certain offenses are to be disposed of by NJP.

C. Commander's Suspension Authority

1. Commanders may consider suspending all or part of any NJP awarded, particularly in the case of first offenders or when significant extenuating or mitigating matters are present.
2. Suspension provides an incentive to the offender and gives an opportunity to the commander to evaluate the offender during the period of suspension.

D. Minor Offenses

1. NJP is typically imposed for acts or omissions that are minor offenses under the UCMJ. Whether an offense is minor depends on several factors:
  - a. nature of the offense;
  - b. circumstances surrounding its commission;
  - c. the offender's rank;
  - d. offender's age; and
  - e. offender's duty assignment, record and experience.
2. The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment.

3. NJP for a serious offense is not a bar to trial by court-martial for the same offense. A General Officer's consent will be required to prosecute the case at a court-martial.

E. Limitations on NJP

1. NJP may only be imposed once per offense;
2. NJP may not be increased once it has been imposed;
3. NJP may not be imposed for offenses which were committed more than two years before the date of imposition; and
4. A civilian court may not impose NJP.

F. Administrative Corrective or Non-Punitive Measures

1. Administrative corrective measures are not punishment.
2. Such measures may be used for acts or omissions, which are not offenses under the UCMJ and for acts, or omissions that are offenses under the code.
3. Administrative corrective measures that promote efficiency, good order and discipline include:
  - a. counseling;
  - b. admonitions;
  - c. reprimands;
  - d. censures;
  - e. extra military instruction; and
  - f. administrative withholding of privileges.

## **VIII. Courts-Martial**

A. Courts-Martial Composition

A court-martial is composed of a military judge, attorneys and a panel of members, except in cases of summary courts-martial.

1. The military judge must be:
  - a. a commissioned officer;

- b. a member of the bar of a state or federal court; and
  - c. certified as a military judge.
- 2. Military trial and defense counsel must be:
  - a. graduates of an accredited law school;
  - b. members of a state or federal bar; and
  - c. certified competent to perform trial duties.
- 3. Any active duty service member is eligible to serve on a court-martial panel. Normally, the members are officers, or in the case of an enlisted service member, senior enlisted. Additionally, the members cannot be:
  - a. junior to the accused in rank; or
  - b. involved in the case as a government witness, accuser, investigator, or counsel.

B. Convening a Court-Martial

A court-martial is convened by a commanding officer who has convening authority. The authority to convene a court-martial is determined by its type: general, special, or summary. The greater the level of court-martial, the higher the level of the commanding officer required convening it.

- 1. Summary Court-Martial
  - a. presided over by one commissioned officer;
  - b. has jurisdiction only over service members, and may be conducted only with their consent; and
  - c. punishment of up to one-month confinement, or other relatively modest punishment, may be imposed.
- 2. Special Court-Martial
  - a. Composed of:
    - 1) a military judge;
    - 2) a defense counsel and prosecutor; and
    - 2) at least three members.

- b. jurisdiction over most offenses under UCMJ;
  - c. may impose punishment no greater than:
    - 1) 1 year confinement;
    - 2) three months of hard labor without confinement;
    - 3) a bad conduct discharge;
    - 4) forfeiture of 2/3 rds pay for not more than 1 year; and
    - 5) a reduction in rank.
3. General Court-Martial
- a. Composed of:
    - 1) a military judge;
    - 2) a defense counsel and prosecutor; and
    - 3) at least five members.
  - b. has jurisdiction over all offenses under UCMJ; and
  - c. may impose any lawful sentence, including death.

## **IX. Military Appeals Process**

### **A. Overview**

- 1. After a conviction by any court-martial, all accused receive at least one level of automatic appeal.
- 2. Following authentication by the military judge, the case will be reviewed by the legal officer or staff judge advocate for the convening authority.
- 3. If the punishment is minor, the case is then forwarded to the Staff Judge Advocate for the Officer Exercising General Court-Martial Authority (OEGCMA) for final review.
- 4. In a serious case, if the accused exercises a waiver of appellate review, it will be forwarded to the Staff Judge Advocate for the OEGCMA for review.
- 5. If the accused receives a serious punishment or a punitive discharge from military service and does not waive appeal, the

convening authority will forward the case, via the Judge Advocate General of the respective service, to the Court of Criminal Appeals for that service.

6. Following the decision of the Court of Criminal Appeals, the accused can petition the Court of Appeals for the Armed Services for further review.
7. If the Court of Appeals accepts the petition and rules on the case, the accused then has the right to petition the United States Supreme Court by writ of certiorari to seek final review.

B. Initial Review

1. Upon conviction at court-martial, a record of trial is prepared and reviewed by the attorneys and certified by the military judge.
2. The record is then forwarded to the convening authority of the court-martial for the initial review.
3. With the aid of a legal officer or staff judge advocate, the convening authority reviews the case and it is within the sole discretion of the convening authority to approve only those findings and sentences that he finds appropriate.
4. The convening authority can reduce a sentence, but may not reverse a finding of “not guilty”, nor may he increase the sentence.

C. The Courts of Criminal Appeal

1. The record of trial is forwarded to the Court of Criminal Appeals by the convening authority via the Judge Advocate General of the respective service;
2. There are four Courts of Criminal Appeals:
  - a. Army;
  - b. Air Force;
  - c. Navy-Marine Corps; and
  - d. Coast Guard.
3. Each court has between nine and twelve judges who sit in three judge panels.

4. Automatic appeal of serious convictions to the Court of Criminal Appeals is considered one of the primary protections afforded to the accused.
5. The accused has a military appellate defense counsel appointed for him at no charge. The accused may also retain civilian counsel at his own expense. When civilian counsel is retained, the military attorney usually remains on the case as associate counsel.
6. Courts of Criminal Appeals have the power to decide matters of both fact and law. They have complete power of review under the UCMJ, offering a tremendous ability to protect the rights of the accused.

D. Court of Appeals for the Armed Forces

1. Five-member court comprised of civilian judges.
2. The judges are appointed for fifteen-year terms and no more than three judges can be from the same political party.
3. This Court decides issues of law, but not fact.
4. The Court can invalidate any regulation, executive order, or statute that conflicts with higher authority.
5. Two types of cases are decided by this court:
  - a. automatic review for all death penalty cases, as well as all cases certified to the court by any service Judge Advocate General following a decision in the case by the Court of Criminal Appeals; and
  - b. the Court may accept cases by petition from the appellant, which accounts for the majority of the cases heard by the court.
6. Court's term runs from 1 October to 30 September;
7. All decisions are reported in the Military Justice Reporter and create precedent.

E. United States Supreme Court

Review by the United States Supreme Court is the final step in the direct appeals process. Access to the court is highly controlled, as it is the highest court in the land. Unless the Court of Appeals for the Armed Services has taken action on an appellant's case, that appellant has no direct appeal to the Supreme Court.

## **X. Military Legal Advisors**

A military legal advisor can assist the military commander in many ways. He may provide information about regulations to military commanders in advance of official decisions; defend the military as an institution in the court system from lawsuits and claims; review proposed military action to ensure that it is consistent with the rule of law; assist military commanders to formulate recommendations and provide information to civilian policymakers on military issues.

### **A. Functions**

#### **1. Command Advice**

The legal advisor gives advice to the commander and other members of the staff. A skillful legal advisor does not interfere with the important military objectives undertaken by the staff, however if a proposed action violates a law or regulation, he will propose alternatives that are legally permissible. Specific areas of legal advice may include:

- a. criminal investigations;
- b. convening courts-martial;
- c. accident investigations;
- d. military and civilian personnel actions;
- e. applications of regulations;
- f. release of government information;
- g. advice on application of international law to military operations; and
- h. formulation and application of rules of engagement.

#### **2. Liaison**

Military legal advisors must have a clear understanding of military operations and the laws and regulations that affect those operations. Military legal advisors are directly involved in the liaison between the military and civilian leadership. The services provided may include:



- a. provide information to military decision-makers regarding pending legislation in the Congress, so that commander may provide timely and useful recommendations with respect to the proposed legislation;
- b. assist military commanders in formulating recommendations for legislative initiatives to be introduced in the Congress through the appropriate chairperson; and
- c. respond to inquiries from congressional members or their staffs regarding individual service members who have contacted the congressional member for assistance.

3. Representation of Service Members

Military attorneys also represent service members facing courts-martial and provide general legal assistance to service members including:

- a. drafting of wills;
- b. preparing powers of attorney;
- c. aiding in tax preparation; and
- d. other general legal advice.

Legal counsel is provided to service members at no cost. As mentioned previously, members have the right to obtain civilian counsel at his / her own expense.

B. Training

1. Attorneys

All military attorneys have graduated from an accredited civilian law school and passed a state licensing examination. Additionally, primarily the three military judge advocate schools provide legal training in the military. Each school conducts training for attorneys and non-attorneys. There is a central coordinating committee to coordinate joint courses and share resources. The three military judge advocate schools are:

- a. the Judge Advocate General's School, U.S. Army;
- b. the Naval Justice School, U.S. Navy, Marines, and Coast Guard; and
- c. the Air Force Justice School, U.S. Air Force.

2. Non-Attorneys

Some clerical actions concerning military justice are carried out by non-attorney military officers and enlisted personnel. Accordingly, the judge advocate schools offer specialized training to prepare these individuals to carry out their legal duties. Non-attorney training may include:

- a. senior officer training;
- b. legal officer training; and
- c. enlisted paralegal training.

3. General Training for Service Members

All members of the military also receive training in key areas such as law of armed conflict (as required by the Geneva Convention), sexual harassment, rules of engagement, and pre-deployment legal matters. These and other topics are presented as needed by the situation.